THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:	Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent	)))))
IN RE:	Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)))))))
IN RE:	Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans	)))))))))))

EXPEDITED REVIEW

REPLY BRIEF IN SUPPORT OF MOTION TO ADMIT DEPOSITION TESTIMONY FROM THESE AND OTHER PROCEEDINGS AS EVIDENCE

INTRODUCTION

The response of South Carolina Electric & Gas and Dominion Energy, Inc. (collectively, the "Joint Applicants") to the South Carolina Office of Regulatory Staff's ("ORS's") motion to admit deposition testimony from other proceedings demonstrates the Joint Applicants' continuing refusal to permit appropriate discovery and pre-hearing procedures for the swiftly-

approaching hearing in these important proceedings. The Joint Applicants generally ignore the merits of ORS's motion, focusing their opposition on ORS's pre-filing meet and confer efforts and arguing that with a better effort "the parties might have been able to narrow this dispute." Yet, the Joint Applicants made no effort to attempt to narrow this dispute after the motion was filed or even in their brief in response to the motion. This is just the latest example of Joint Applicants' "four corners"[1] strategy of delay in order to run out the clock that is quickly ticking down to the November 1 start of the hearing in this matter.

ORS is not asking, as the Joint Applicants suggest, for the Commission to pre-admit deposition testimony carte blanche without regard to any of the rules of evidence. ORS is merely asking the Commission to rule that any deposition testimony that would otherwise be admissible under S.C. Rule of Evidence 804(b)(1) when the deponent is unavailable to testify at the hearing will be admissible in these proceedings even if the witness is actually "available" to testify in person. Given the issues at stake and the limited time available at the hearing and to prepare for the hearing, ORS's motion is eminently reasonable. Moreover, it is explicitly permitted under the Commission regulations, which provides that "when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form." S.C. Code Ann. Regs. 103-846. Furthermore, the Hearing Officer has asked the parties to move forward with agreements precisely like the one ORS proposes here. *See* Order No. 2018-81-H ("I would ask the parties to confer and attempt to develop a list of documents or other matters that might be stipulated into the record without objection. This

[1] The "four corners" was a college basketball defense perfected by UNC Coach Dean Smith in the 1970s, before the NCAA instituted a shot clock. The strategy consisted of spreading out the offense to the "four corners" of the team's offensive half of the court once the team had a lead, and then simply running out the game clock.

procedure could save time in the hearing. I would request that ORS lead this process."). Thus, the Commission should grant ORS's motion.

Furthermore, the Joint Applicants provide no basis for denying ORS's request to take the depositions of 17 specific witnesses. The Joint Applicants make no arguments at all regarding the relevance and need for the deposition testimony of these witnesses. Rather, they again focus on non-substantive issues such as confidentiality and the mere potential that the depositions will duplicate testimony in the state court class action proceedings. The Joint Applicants' concern about duplication is somewhat ironic since they will not agree to the admission of deposition testimony taken in other proceedings. In any event, the Commission should simply permit the parties to negotiate these non-merits issues along with the logistics of the depositions and should issue an order permitting the depositions to be taken.

DISCUSSION

A. ORS Is Only Moving To Admit Otherwise Admissible Deposition Testimony Regardless of Witness Availability to Testify In-Person at the Hearing.

The Joint Applicants wrongly suggest that ORS is asking the Commission to rule that any deposition testimony is admissible. That is not the case. The Joint Applicants are well aware that there are parallel state court class action proceedings brought by SCE&G's ratepayers against SCE&G that involve many of the same facts at issue in these proceedings. In fact, the Joint Applicants explicitly acknowledge the relevance of those state court actions by expressing concern that depositions in these proceedings would be duplicative of depositions in those cases.

In this motion, ORS is merely seeking a ruling that permits the admission of deposition testimony of witnesses that would be admissible under the rules of evidence if the witness was unavailable to testify at the hearing. The South Carolina rules of evidence permit the admission

of deposition testimony if the witness is unavailable to testify at a hearing. *See* S.C. Rule of Evid. 804(b)(1) ("Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.").

This ruling is necessary in this action for two reasons. First, the parties do not have the luxury that exists in most civil litigation of taking depositions of witnesses months before trial and then verifying the availability of witnesses to testify prior to pre-trial filings. The pre-hearing filings in these proceedings start in a few weeks, and the parties have not even begun taking depositions. It would be a tremendous waste of valuable time for the parties to spend time taking depositions of witnesses that will ultimately not even be admissible at the hearing because the witnesses are available to testify at the hearing. A ruling that ensures that witness availability will not be an obstacle to admission of the deposition transcript will provide the parties with the needed certainty to move forward with depositions.

Second, the limited time available to take evidence at the hearing also makes this ruling necessary. It is essential that the parties and the Commission focus the limited time available on the most important evidence at the hearing. A ruling that permits the admission of deposition testimony of witnesses without regard to availability to testify at trial will further the interests of justice in creating a more efficient hearing and allowing a full airing of the testimony of the key witnesses. *See* Rule 1, SCRCP ("[These rules] shall be construed, to secure the just, speedy, and inexpensive determination of every action.").

The Joint Applicants' suggestion that ORS's motion somehow contravenes the rules of evidence is not correct. Commission regulations provide the Commission with the authority to adapt the submission of evidence in exactly this manner. *See* S.C. Ann. Regs. 103-846 ("[W]hen a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form."). Furthermore, since the Commission is likely to limit the time each party can present evidence at the hearing, it is likely that many witnesses will be "unavailable" to testify anyway due to these limitations. Thus, the end result would be the same. A ruling in advance on this evidentiary issue would simply provide the parties with needed clarity prior to pre-hearing filings. This is precisely what the Hearing Officer has asked the parties to do:

> Commission Regulation 103-846 states that, subject to certain requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. Of course, such evidence must be relevant, material, and not unduly repetitious, among other legal requirements. I would ask the parties to confer and attempt to develop a list of documents or other matters that might be stipulated into the record without objection. This procedure could save time in the hearing. I would request that ORS lead this process.

Order No. 2018-81-H.

B. ORS's Request to Take the Deposition of Specific Witnesses is Meritorious.

ORS also requested that the Commission permit the parties to take the depositions of 17 specific witnesses. In response, the Joint Applicants do not take issue with any of these witnesses being deposed. Rather, the Joint Applicants focus only on non-substantive matters, including the confidentiality of the deposition transcripts and the potential that some of the depositions may be duplicative of depositions in the parallel litigation.

The Joint Applicants' focus on confidentiality over all else is misplaced. Joint Applicants' assertion that ORS has refused to agree to confidentiality in the state-court action is not true. Act 258 (S.C. Code Ann. § 58-4-55 (Supp. 2017 and as amended by Act No. 258, 2018 S.C. Acts ___)) requires that ORS keep information confidential, states a confidentiality agreement is not needed, and exempts the information from FOIA. This should satisfy any concerns. ORS and the State have offered to consent to a confidentiality order in that proceeding that would allow documents produced there to be used in this proceeding, and that recognizes the ORS's and the State's obligations as state entities to comply with the Freedom of Information Act. SCE&G has refused to agree to those terms. Further, and more importantly, it is vital that depositions commence in these proceedings in which billions of dollars are at stake. If Joint Applicants believe that confidential information has been disclosed during any deposition, then they are free to move the Commission for appropriate protection of such information. However, these generalized concerns about confidentiality are not a basis to delay discovery any further, as the Joint Applicants did with respect to document requests regarding the Bechtel Report before finally volunteering to produce information in the face of a motion to compel.

In sum, the Commission should issue an order finding ORS's request for these depositions to be meritorious and permit the parties to begin taking depositions.

CONCLUSION

For the forgoing reasons, ORS respectfully requests that the Commission issue an order (1) permitting the use of transcripts and/or videos of depositions taken in these proceedings and in the related cases—in which SCE&G is noticed and permitted to attend, question witnesses, and defend its interests—as evidence at the hearing in these proceedings, and (2) finding that ORS's request to take the depositions of 17 witnesses in these proceedings is meritorious.

Respectfully submitted,

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